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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1079

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,

Petitioners,

against

HEROLD O. LINABARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1974

No.

MARITIME OVERSEAS CORP., and INTERCONTINENTAL BULK TANK CORP.,

Petitioners,

against

HEROLD O. LINABARY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

Opinions Below

The only pertinent opinion rendered was the memorandum opinion of the District Court denying the respective motions of each party for judgment notwithstanding the verdict. This decision is unreported but appears in the appendix * herein at page 9a.

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* a-refers to the appendix herein. A-refers to the trial appendix.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court was entered on the 21st day of October, 1974 (1a). The orders of the Court of Appeals denying a rehearing and a rehearing in banc were entered on the 2nd day of December, 1974 (p. 3a and 4a).

The jurisdiction of this Court is invoked under 28 USC 1254(1) and 28 USC 2101(c).

Questions Presented for Review

1. Where respondent's medical expert testified that the "likelihood" was that all the damage to plaintiff's knee was caused in an accident for which petitioners were held not liable and further testified there was only a "remote possibility" that surgery could have been obviated following the original injuries, may a jury in a Jones Act case nonetheless speculate that the ensuing surgery was made necessary as a result of petitioners' negligent post accident treatment of respondent?

2. Is not the decision of the Court below, upholding the District Court, an endorsement of the bare or remote possibility standard of medical causation and therefor in conflict with the decisions of this Court and its own decisions of *Fitzgerald* v. *A.L. Burbank & Co.*, 451 F.2d 670, 681 (1971) and *Henry & Braye* v. *A/S Ocean, et al.*, F.2d (January 6, 1975, slip opinion p. 1141, 1152) which uphold a standard of reasonable medical probability?

3. Can this Court's decision of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959) be interpreted as approving a possibility standard of medical causation as maintained by the Fifth Circuit in *Central Gulf Steamship Corp.* v. *Sambula*, 405 F.2d 291, 301-302 (1968) and fol-

lowed by the District Court and Court of Appeals herein, or should it be based on reasonable medical probability as *Fitzgerald* and *Henry & Braye*, supra have interpreted Sentilles?

Statement of the Case

District Court jurisdiction arose under 28 USC Section 1331 as an action under the Jones Act, 46 USC 688. Jurisdiction in the United States Court of Appeals for the Second Circuit was based on 28 USC Section 1291.

Respondent Herold O. Linabary was a seaman (oiler) in the employ of petitioners who are respectively the manager and registered owner of the s/t *Overseas Alice*. He sued (November 4, 1970) for various knee injuries sustained in a fall on the after deck of the vessel on the night of September 10, 1970. Alleged were the negligence of petitioners and the unseaworthiness of the vessel. Later, and in January 1973, plaintiff amended his complaint to allege a cause of action for aggravation of these injuries. Following trial in May of 1973, the jury ruled in petitioners' favor on the issues of negligence and unseaworthiness relative to the accident of September 10, 1970. It also ruled for respondent on the aggravation issue awarding $50,000, but reducing it by 50% attributable to his contributory negligence (5a-6a).

Petitioners then moved (A407) for judgment n.o.v. on the aggravation issue pursuant to Rule 50(b) FRCP in accordance with their motions for a directed verdict at the close of the evidence (A348) which followed a motion to dismiss this cause of action made at the end of plaintiff's case (A346). This was denied in a memorandum decision of June 1, 1973 by the District Court (9a).*

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* Respondent's motion for judgment n.o.v. on the contributory negligence finding was also denied. His motion seeking to extend his time to file a notice of cross-appeal was denied by the District Court, 376 F. Supp. 688. No appeal was taken from this ruling.

Petitioners, not challenging the proposition that the jury could reasonably have found the vessel's Chief Mate did not give proper or adequate treatment to respondent while aboard the vessel, raised the sole issue on appeal that the jury could not reasonably conclude, as it evidently did, that petitioners' negligence was a proximate cause of the surgery which prolonged plaintiff's recovery, and that a finding to this effect could only have been based on speculation and conjecture.

Following oral argument on October 15, 1974, the Court of Appeals on the 21st of October handed down a memorandum judgment affirming on the District Court's memorandum opinion of June 1, 1973. Petitions for rehearing and rehearing in banc were denied without opinion on December 2, 1974.

The facts

It is not disputed that respondent fell on the after deck of the s/t *Overseas Alice* on the night of September 10, 1970 while on a voyage from Alaska to the San Francisco Bay area. How he fell was the subject of conflicting accounts which the jury resolved in petitioners' favor on both issues of negligence and unseaworthiness (p. 5a). He suffered severe injuries of the left knee which involved the tearing of four ligaments (Dr. Sherman A192).

Following the accident, he came under the care of the vessel's Chief Mate for the next 36 hours or so before the vessel docked. In essence, it was the latter's claimed negligence in failing to immobilize respondent that formed the basis of the aggravation claim. The jury divided the responsibility for aggravation between petitioners and respondent by finding him 50% contributorily negligent.

As indicated, petitioners agreed both in the District Court and in the Court below that the jury might reasonably have found some increase in pain or discomfort for a maximum period to September 28, 1970 when extensive surgery was performed on the left knee.

Petitioners urged in the District Court and Court of Appeals that if the need for surgery arose following the original injuries of September 10, 1970, for which petitioners were exonerated from liability, then they could not be held for the consequences of the surgery which complicated respondent's injuries and increased his disability, pain and suffering.

Thus, as a direct result of the surgery, plaintiff developed a staph infection which Dr. Sherman said (A181) was "disastrous as far as healing is concerned". As a result of the surgery, he was in a cast until December 8, 1970 (Ex. 13, p. 5) and then developed as Dr. Sherman described an "inherent and painful surgical scar". He also found a quadriceps atrophy which he attributed to "the actual accident" and "the prolonged disuse of the knee". Plaintiff's medical expert also found (A187 and A199) that a traumatic arthritis ensued from "the actual accident itself and, two, the injury caused by surgery * * * ". The poor surgical results the first time around made necessary a further surgical intervention in February 1972 (Sherman A188).

With all of the above traceable directly to the original injury or ensuing surgery, petitioners have stressed that their only aggravation responsibility was almost a de minimis one for such pain and suffering which comprised ½ of that over and above the existing non-compensable pain and suffering caused by the original injury, from the date of first treatment on September 11 to the date of surgery, September 28, 1970.

Accordingly, if surgery were necessary in any event, the jury could not have awarded $12,500 ($6,250) under questions 4(c) and (d) (p. 5a) for future pain and suffering from the date of the verdict, May 4, 1973. Similarly, the $5,000 ($2,500) for the lost wages, to the date of the verdict under 4(e) and (f) (p. 6a) should have been stricken since anything after September 28, was attributable to surgery, and irrespective of improper treatment, respondent could not have possibly worked between September 12, 1970 (when paid off) and September 28, 1970 (surgery). Further, the jury could not have awarded $20,000 ($10,000) for future lost wages under 4(f) and (g) (p. 6a).

The only segment of the jury verdict which would have to be apportioned would be 4(a) and (b) (p. 5a) "pain, suffering and disability to date" $12,500 ($6,250). This would cover the entire period from September 11, 1970, when first treated, to the date of the verdict May 4, 1973 but should have been limited to September 11-28, 1970—a fractional part of the total. As to this negligible amount petitioners suggested a remittitur.

The speculative testimony

The testimony upon which the District Court, the Court of Appeals and respondent rely to sustain the verdict on the aggravation issue is that of Dr. Harry Sherman, plaintiff's medical expert. Petitioners' medical expert, Dr. Vincent Lodico, testified unequivocally (A292):

> "Q. Given an initial injury of that nature doctor would surgery have been mandated? A. Absolutely.

(A293):

> Q. What is the reason for that opinion Doctor? A. A tearing of these structures renders the knee

unstable, and no form of treatment except a surgical repair of the torn ligaments will suffice to restore the knee joint to stability so that the patient could walk.

The Court (A320):

Q. What you are saying is that all of the damage was done at the time of the initial impact, the time of the initial injury.

The Witness: That's right, your Honor.

The Court: And the surgical treatment that was thereafter given was required in any event.

The Witness: For that very injury that occurred when he fell down.

The Court: And the fact that he was not immobilized did not mean that he would not have required the surgery.

The Witness: Oh, no. He had to have every procedure that was done on him, just the same."

The opinion of the District Court (9a) said of Dr. Sherman

"Admittedly his testimony contained contradictions, but there was sufficient evidence, if believed, to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures."

It is submitted that while there were contradictions* in Dr. Sherman's testimony and while not as unequivocal as

* The principal "contradiction" was between his first report of May 10, 1972 (Ex. I), which pre-dated the aggravation amendment, and said "The accident as described above is a competent proceeding cause for the injuries of the left knee which necessitated the treatment (surgery) outlined above", and his trial testimony which said prompt immobilization might possibly have avoided surgery.

Dr. Lodico's on the subject, both medical opinions are on the same side of the ledger. Dr. Sherman's testimony varies only insignificantly between direct and cross-examination.

Recovery here should not be predicated on Dr. Sherman's ritualistic and generalized response to a lengthy hypothetical question or direct examination that the treatment afforded aboard the vessel (A176) "would materially aggravate or worsen the condition of Mr. Linabary's left knee", since he immediately undermined whatever probative value this may have had in his response to the next question which gave the basis for his opinion. He stated (A176):

> "First torn ligaments and torn cartilages heal very poorly, at best, without surgery. However, there is a possibility of healing and this healing to take place, must be done when the joint is immobilized."

• • •

(A176-177):

> "Assuming that such a healing might possibly have taken place in Mr. Linabary, it is obvious that the manner in which he pursued the next two weeks* or so after the injury did not allow for such optimum conditions for healing."

Petitioners objected to the conjectural nature of this testimony (A178):

> "Mr. Byrn: I also object on the grounds that this is highly speculative. The doctor himself said there was a remote possibility of healing."

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* Corrected to two days. (A178)

Here it is submitted the trial court initiated the error continued through the shipowner's motion to dismiss his cause of action at the end of plaintiff's case (A346), for a directed verdict (A348), and in the decision denying the motion for judgment notwithstanding the verdict (p. 9a).

(A178):

> The Court: The doctor is expressing an opinion as he stated it with reasonable medical certainty.

Actually, all Dr. Sherman said with reasonable medical certainty was that there was a very poor chance of healing soundly without surgery and this possibility, if it existed, was removed by the failure to immobilize plaintiff or curtail weight bearing on the knee. This is far from saying with reasonable medical certainty or, as more currently employed, reasonable medical probability that surgery would have been obviated by proper treatment.

Dr. Sherman's testimony on cross-examination shows an almost total rejection of the proposition that negligent aggravation had anything to do with the need for surgery (p. A207):

> Q. I believe that you said that with respect to this aftermath of the original accident that the possibility was remote that healing would take place in any event; is that an accurate statement? A. Yes, it is.

He also conceded the likelihood that all the damage to plaintiff's knee was caused by the original accident (A208):

> Q. Since the possibility of healing is remote, would you say that the likelihood was that all the damage was caused in the original accident? A. The likelihood is yes, but if there were any chance

at all of healing, my opinion was as I stated in answer to Mr. Tabaks question that it was eliminated by the use of the knee.

Dr. Sherman candidly admitted (A209):

A. However, I have no way of knowing whether it would actually have healed or not. I can't possibly tell you that this particular distance in time from the accident.

(A222):

Q. Doctor, your testimony is that the usual case healing is not possibly in any event, is that right? A. I did not say that. That is not my testimony at all.

Q. What is your testimony? A. My testimony is that healing is possible but that in injuries of the severity of Mr. Linabary's, it is not a good possibility but the possibility exists.

Q. It is remote? A. That is right.

Q. You used the word, 'remote'? A. Yes, that is correct.

How conjectural this testimony becomes is further dramatized by his concession that by going down five sets of ladders into the engine room, after the original accident, it was "possible" that the "remote possibility" of averting surgery had already been eliminated before respondent reported to the Chief Mate for treatment.

(A219-220):

Q. The criterion then is that he should receive the treatment as soon as possible? A. That is right.

Q. Therefore he should not have gone down five sets of ladders into the engine room right after the accident. A. No; he should not.

Q. And the possibility of healing might have been foreclosed by the very expedition into the engine room. A. It's possible.

It is submitted therefore that the differences between the testimony of Dr. Sherman and Dr. Lodico were insubstantial, differing only in degree. In sum Dr. Sherman said the "likelihood" was that all the damage was caused by the original accident. Dr. Lodico said that this definitely was so and surgery was indicated right from the start. Dr. Sherman testified that torn ligaments cartilages heal "very poorly at best" without surgery and that he had "no way of knowing" this long from the injuries whether they would have healed or not without surgery. He agreed that with injuries of the severity of Mr. Linabary's the chances of healing represented only "a remote possibility".

Thus, the jury was permitted to make a random selection of a remote possibility without any reason for doing so other than having the door of possibility cracked open for them.

REASONS FOR GRANTING THE WRIT

I.

Against the decisions of this Court and the decision of *Fitzgerald* v. *A. L. Burbank & Co.*, 451 F.2d 670, 681 (2 Cir. 1971) reaffirmed in *Henry & Braye* v. *A/S Ocean*, F.2d (January 6, 1975, slip opinion, (pp. 1141, 1152) the District Court and the Court of Appeals have permitted a jury verdict based on speculation, conjecture and possibility.

This Court has never equated speculation and possibilities with probative evidence. In *Atchison, Topeka and Santa*

Fe Railway Co. v. *Toops,* 281 U.S. 351, 354 (1930). This Court concluded (p. 357):

> "If allowed to sustain the verdict it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

In *Galloway* v. *United States,* 319 U.S. 372, 395 (1943) this Court stressed:

> "the essential requirement is that mere speculation be not allowed to do duty for probative facts."

See also *Tennant* v. *Peoria and Pekin Union Railway Co.,* 321 U.S. 29, 32 (1944).

In *Moore* v. *Chesapeake and Ohio Railway,* 340 U.S. 573, 576 (1951), this Court noted that disbelief of testimony "would not supply a want of proof". Similarly, here jury disbelief of the opinions of plaintiff's medical expert, Dr. Sherman, as to the "remote possibility" or unlikely contingency that respondent could have avoided surgery following the original accident, would be as said (p. 578):

> "speculation run riot. Speculation cannot supply the place of proof."

Other decisions of this Court refer to the "probability" standard of proof of causation, *Dezon* v. *American President Lines, Ltd.,* 318 U.S. 660, 661 (1943); the "balance of the probabilities" *McAllister* v. *United States of America,* 348 U.S. 19, 22 (1954); the jury may elect from among a choice of "probabilities" *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U.S. 500, 506 (1957).

In *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107 (1959), relied upon by the District Court there was

language (p. 109) as to the "most likely causes of the aggravation of the tuberculosis" and the "accident probably aggravated his condition".

There are no indications to this day that this Court will allow a jury verdict to stand when its underpinnings are only speculation, conjecture and possibilities. Justice Frankfurter made this clear in a memorandum accompanying a denial of certiorari in *Elgin, Joliet & Eastern Railway Co.* v. *Gibson*, 355 U.S. 897 (1957):

> "Not until this Court explicitly holds that in 'F.E.L.A. cases speculation, conjecture and possibilities suffice to support a jury verdict', which is the holding of the Court of Appeals in this case, 246 F.2d 834, 837, is that to be assumed to be the law of this Court."

In 1960, this Court was challenged directly by the Court of Appeals for the First Circuit, *Henagan* v. *New York, New Haven and Hartford Railroad Company*, 272 F.2d 153, 157 (1959) to acknowledge that it had sired a "barest possibility of causation" standard in F.E.L.A. cases. This Court had no difficulty in itself directing the entry of judgment n.o.v. on grounds of insufficiency of evidence. *New York, New Haven and Hartford Railroad Co.* v. *Henagan*, 364 U.S. 441 (1960).

Over the years, this Court has followed a rule of reason which it is submitted cannot by definition accommodate a standard where poor or remote possibilities are speculated upon. This becomes especially true when all the medical testimony reveals that the likelihood or probabilities are the other way.

In *Fitzgerald* v. *Burbank & Co.*, 451 F.2d 670, 681 (1971), the Second Circuit followed the guidelines laid

down by this Court. Substitution of only a few words show the close applicability of that opinion to the case at bar.

> "The plaintiff could have made out a prima facie case on the issue of causation if he could have introduced sufficient evidence to show that Graser's (Linabary's) condition, when he entered the hospital, was such that there was a *reasonable probability* that proper care would have prevented (avoided) his death (surgery)." (Emphasis added)

In discussing the latitude given the jury the Court went on to say, p. 681:

> "But of course, the jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause, of the injury, see *Sentilles, supra,* 361 U.S. at 110, 80 Ct. 173." (Emphasis added).

Fitzgerald was reaffirmed by the Second Circuit in *Henry & Braye* v. *A/S Ocean,* F.2d (January 6, 1975, slip opinion 1141, 1152).

> "Braye, of course, was obligated to offer some reasonable proof that his injuries were proximately caused by the shipowner's breach of duty. *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F.2d 670, 681 (2d Cir. 1971). Direct medical testimony of causation need not be introduced in every case, *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 109-10 (1959). But a jury 'is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause of the injury,'' *Fitzgerald, supra* at 681."

II.

Petitioners urge this Court to resolve the conflict in interpreting *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109 (1959) as to the quality of medical proof of causation between the "possibility" standard of the Fifth Circuit, followed by the panel of the Court of Appeals herein, and the "probability" standard of the *Fitzgerald* and *Henry & Braye* decisions in the Second Circuit.

Petitioners cannot be faulted for failure to call the *Fitzgerald* case to the attention of both lower courts. Petitioners' memorandum to the District Court on the application for judgment n.o.v. stated:

> "Perhaps the closest authority on the subject is *Fitzgerald* v. *A. L. Burbank*, 451 F.2d 670, 681 (2 Cir. 1971)."

Notwithstanding its apparent relevance, the District Court neither discussed nor cited this authority. *Fitzgerald* was again urged and with the same emphasis on the Court of Appeals in petitioners' main and reply briefs. After rendering its memorandum judgment on October 21, 1974 affirming on the opinion of the District Court of June 1, 1973, petitioners filed a petition for rehearing and rehearing in banc.

Petitioners noted that the Court had now adopted the memorandum opinion of the District Court. In so doing, the Court of Appeals had approved the District Court's interpretation of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107 as rendered by *Central Gulf Steamship Corp.* v. *Sambula*, 405 F.2d 291, 301-302 (5 Cir. 1968). The latter rejected a reasonable medical probability standard of

causation in a seaman's injury case and assumed and approved a "possibility" standard. It was pointed out to the Court below that as opposed to *Sambula*, the *Fitzgerald* decision set up guidelines for a re-trial based on a "reasonable probability standard" (see p. 681 of 451 F.2d). In so doing, the *Fitzgerald* court was expressly interpreting *Sentilles.*

Thus, it appeared to petitioners that the Second Circuit in *Fitzgerald* and the Fifth Circuit in *Sambula* had reached contrary conclusions from their respective readings of this Court's decision in *Sentilles* with *Sambula* going off on "possibility" and *Fitzgerald* on "probability". Since *Fitzgerald* had been pressed upon the District Court and the latter saw fit to disregard it and reach into the Fifth Circuit to follow *Sambula* (with an exact page citation to "possibility"). Petitioners could only conclude that its opinion was an advised omission and a covert rejection of *Fitzgerald.*

With the Court of Appeals expressly adopting the District Court's opinion (2a) the same conclusion must be reached as to it. Petitioners therefore requested on rehearing that the Court acknowledge that it had now overruled its prior *Fitzgerald* decision so that this Court might now hopefully resolve the confusion as to what medical standards of proof are to be applied in the thousands of Jones Act and F.E.L.A. cases in the lower courts throughout the federal judicial system. As earlier indicated, the Court of Appeals denied the applications for rehearing and rehearing in banc without comment on the 2nd of December, 1974.

While the Court below has declined petitioners' invitation to say so and neither Court seems inclined to even mention it by name, it seems self-evident that both the District Court and the Court of Appeals have rejected the *Fitzgerald* interpretation of *Sentilles.* The confusion be-

comes compounded when it is seen that another panel of the Second Circuit has in the interval, pointedly reaffirmed the *Fitzgerald* interpretation of *Sentilles* in *Henry & Braye* v. *A/S Ocean, et al.*, — F.2d —, January 6, 1975, slip opinion p. 1141 at 1152.

Thus, we are presented with the anomaly of the Second Circuit re-establishing the *Fitzgerald* "reasonable probability" view of *Sentilles* in *Henry & Braye, supra,* while less than three months earlier adopting the District Court's opinion which ignores *Fitzgerald* and cites the Fifth Circuit *Sambula* "possibility" interpretation of *Sentilles.*

Under the circumstances, petitioners request this Court to clarify its *Sentilles* opinion, since not only is there a conflict between the Fifth and Second Circuits, but one within the Second Circuit. In so doing, it should not escape this Court that in *Sentilles* there was medical testimony as to "most likely causes" and that "the accident probably aggravated his condition", 361 U.S. at 109.

It is also noteworthy that in *Elgin, Joliet and Eastern Railway* v. *Gibson,* 355 U.S. 897 (1957) at least Justices Frankfurter and Harlan promised that if and when this Court held that "speculation, conjecture and possibilities" would suffice to support a jury verdict, it would say so explicitly. Presumably, if the standard of "reasonable medical probability" had been abrogated by the *Sentilles* majority and a "possibility" standard set up, we would have heard more from Justice Harlan who joined Justice Stewart, concurring in the result, and especially from Justice Frankfurter who dissented solely on administrative grounds and who, only two years before had, with Justice Harlan, expressed himself rather forcefully on the point in the *Elgin* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

Dated: February 26, 1975

Respectfully submitted

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APPENDIX

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, one thousand nine hundred and seventy-four.

Present:

HONORABLE JOHN A. DANAHER
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. MULLIGAN
Circuit Judges.

73-2103

—o—

HEROLD O. LINABARY,
Plaintiff-Appellee,

against

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,
Defendants-Appellants.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of the Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's memorandum opinion dated June 1, 1973.

/s/ JOHN A. DANAHER
/s/ WILFRED FEINBERG
/s/ WILLIAM H. MULLIGAN

Order Denying Rehearing by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of December, one thousand nine hundred and seventy-four.

Present:

HON. JOHN A. DANAHER,
HON. WILFRED FEINBERG,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

73-2103

—o—

HEROLD O. LINABARY,
Plaintiff-Appellee,

against

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,
Defendants-Appellants.

—o—

A petition for a rehearing having been filed herein by counsel for the Defendants-Appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing *in Banc* by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the city of New York, on the second day of December, one thousand nine hundred and seventy-four.

73-2103

—o—

HEROLD O. LINABARY,

Plaintiff-Appellee,

v.

MARITIME OVERSEAS CORPORATION and INTERCONTINENTAL BULK TANK CORP.,

Defendants-Appellants.

—o—

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Irving R. Kaufman

Jury Verdict—May 4, 1973

Linabary v. *Maritime Overseas Corp. and Intercontinental Bulk Tank Corp.*, 70 Civil 4831 .... 5/4/73

1. Do you find that Linabary has established his claims of unseaworthiness? [answer yes or no] NO

2. Do you find that Linabary has established his claim of negligence because of failure to provide a reasonably safe place to work? [answer yes or no] ..... NO

3. Do you find Linabary has established his claim of aggravation of injuries based upon alleged negligent failure to furnish adequate medical aid? [answer yes or no] ..... YES

If your answer to all of the above questions is no, you proceed no further.

If your answer is yes to any of the above questions, you answer the following:

4. Has the plaintiff sustained his burden of proof as to:

   (a) pain, suffering and disability to date? [answer yes or no] ..... YES

   (b) if your answer is yes, what is the amount of damages? $12,500

   (c) future pain, suffering and disability he is reasonably likely to sustain? [answer yes or no] ..... YES

   (d) if your answer is yes, what is the amount? $12,500

Jury Verdict—May 4, 1973

(e) loss of wages from the date of the accident to the present [answer yes or no]	YES
(f) if your answer is yes, what is the amount	$5,000
(g) future loss of wages he is reasonably likely to sustain? [answer yes or no] ..	YES
(h) if your answer is yes, what is the amount reduced to present worth?	$20,000
5. What is the total amount of damages?	$50,000
6. Did the defendant sustain its burden that plaintiff contributed to the accident? [answer yes or no]	YES
7. If the answer is yes, what percentage?	50%
8. Deducting the percentage from the total amount of damages referred to in 5, what sum do you find plaintiff is entitled to recover? ..	$25,000

Judgment of the District Court—May 14, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73,447

—o—

HEROLD O. LINABARY,

Plaintiff,

against

MARITIME OVERSEAS CORPORATION & INTERCONTINENTAL BULK TANK CORP.,

Defendant.

—o—

The issues in the above entitled action having been brought on regularly for trial before the Honorable Edward Weinfeld, United States District Judge, and a jury, on May 1, 2, 3 and 4, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the said special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff in the amount of $50,000, and the jury having also found that the plaintiff contributed to the negligence to the degree of 50% thereby reducing the amount of the award to $25,000, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff, Herold O. Linabary, have judgment against the defendants,

Judgment of the District Court—May 14, 1973

Maritime Overseas Corporation & International Bulk Tank Corp., in the amount of $25,000.

Dated: New York, N. Y.
May 7, 1973

/s/ THOMAS E. ANDREWS 5/16/73
Clerk

A TRUE COPY
THOMAS E. ANDREWS, Clerk

By /s/ E. A. BECKER
Deputy Clerk

APPROVED:

/s/ EDWARD WEINFELD
United States District Judge

Memorandum Decision of the District Court— June 1, 1973

MEMORANDUM DECISION OF THE HON. EDWARD WEINFELD

(JUNE 1, 1973)

70 Civil 4831

The respective motions are denied.

The defendant acknowledges that the "jury could reasonably have found the Chief Officer did not give proper or adequate treatment to plaintiff," but argues there was insufficient evidence upon which the jury could have awarded the amount of damages based upon the testimony of the medical expert, Dr. Sherman. Admittedly, his testimony contained contradictions, but there was sufficient evidence, if believed, to permit a finding that defendant's conduct was the proximate cause of the aggravation of plaintiff's injuries, including the surgical procedures. *Cf.* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959); Central Gulf S.S. Corp. v. Sambula, 405 F.2d 291, 301-02 (5th Cir. 1968); *see also* Armstrong v. Commerce Tankers Corp., 423 F.2d 957, 959 (2d Cir.), *cert. denied*, 400 U.S. 833 (1970); Evans v. S. J. Groves & Sons, 315 F.2d 335, 349 (2d Cir. 1963). The evaluation of his testimony, in the light of its contradictions, was for jury determination.

Plaintiff's motion also is denied. As to question 6 of the special verdict, obviously this was inadvertent as to plaintiff's third claim, and the word "accident" should have been omitted. The question should have been phrased: "Did the defendant sustain its burden that plaintiff was guilty of contributory negligence?" However, the plaintiff (and the defendant) failed to call this obvious error to the

Court's attention. *Cf.* Cundiff v. Washburn, 393 F.2d 505, 507 (7th Cir. 1968); Kirkendoll v. Neustrom, 379 F.2d 694 (10th Cir. 1967); Martin v. United Fruit Co., 272 F.2d 347 (2d Cir. 1959); Filipek v. Moore-McCormick Lines, Inc., 258 F.2d 734, 736 (2d Cir. 1958), *cert. denied*, 359 U.S. 927 (1959); Fed. R. Civ. P. 51. Moreover, there can be no doubt that the jury fully understood the Court's charge on the issue and that it properly applied the doctrine of contributory negligence.

Finally, plaintiff's contention that, as a matter of law, he could not have been contributorily negligent is without merit.

Dated: New York, N. Y.
June 1, 1973

/s/ Edward Weinfeld
United States District Judge